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No. 93-72

In the Supreme Court of the United States

OCTOBER TERM, 1993

HOWARD C. LINCOLN AND NEIL C. LEROY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

THOMAS M. GANNON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether a district court may consider at sentencing conduct involved in a charge on which the defendant has been acquitted.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. 1-43, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1993. The petition for a writ of certiorari was filed on July 12, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners were convicted of conspiracy to transport stolen property in interstate commerce, in violation of 18 U.S.C. 371 (Count 1). The district court sentenced petitioner Lincoln to a term of 15 months' imprisonment, to be followed by a two-year period of supervised release, and ordered him to pay $54,000 in restitution. The court sentenced petitioner Leroy to the same term of imprisonment and period of supervised release, and ordered him to pay $13,500 in restitution.[1] The court of appeals affirmed petitioners' sentences, but remanded the case in part for further proceedings in the district court on one of petitioners' claims. Pet. App. 1-43; Gov't C.A. Br. 4.

1. Petitioners conspired to steal scrap copper from a General Electric (GE) plant in Erie, Pennsylvania, and to ship the stolen copper across state lines. Lincoln Metal Processing, Inc., of which petitioner Lincoln was president and petitioner Leroy was an employee, had a contract with GE to purchase and remove scrap metal from the GE plant. Under petitioners' scheme, a co-conspirator at the plant would fill "roll-offs"[2] with a

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[1] Petitioners were acquitted of four substantive counts charging them with transporting stolen property in interstate commerce, in violation of 18 U.S.C. 2314 (Counts 2, 4, and 6-7). Previously, at the close of the government's case-in-chief, the district court had granted co-defendant William Henry's motion for judgment of acquittal on all charges filed against him (Counts 1-7), and the government agreed to the dismissal as to petitioners of three counts of transporting stolen property (Counts 3, 5, and 8). Pet. App. 13-14; Gov't C.A. Br. 3-4.

[2] A "roll-off" is a large, open-topped metal bin used to store and transport scrap. Once a roll-off is filled with scrap, it can be loaded onto a truck, moved, and off-loaded again as a unit. A roll-off can

considerable amount of copper and then add a top layer of steel to conceal the copper. GE would then bill Lincoln Metal for these loads at the price per pound for scrap steel, which was substantially less than that for copper. The loads would be hauled away, the steel removed, and the copper resold to out-of-state purchasers at a large profit. Pet. App. 4-5; Gov't C.A. Br. 5-6, 9-14.

On August 29, 1989, Robert Fuchs, a truckdriver for Lincoln Metal, became suspicious about a load that he had transported the day before from the GE plant to Lincoln Metal's Chestner yard. Fuchs had left the roll-off outside the fence of the yard. After hearing co-workers gossip about the actual contents of the roll-off, he looked inside the roll-off himself before going home for the day. He found that under the top layer of steel the roll-off was full of copper. Pet. App. 6; Gov't C.A. Br. 7.

After he arrived home, Fuchs called Erie County deputy sheriff Harry Holmwood and told him of his findings and suspicions. Holmwood in turn called county detective Mark Watts. Fuchs, Holmwood, and Watts met sometime after 8 p.m. and drove to the site of the roll-off. They confirmed that the roll-off contained copper and removed several pieces. Pet. App. 6-7; Gov't C.A. Br. 7-8.

Watts then called the Lawrence Park Township police. Just before midnight, Fuchs, Holmwood, and Watts went to the Lawrence Park Township police station, where they spoke with Sergeants Olson and Middendorf. Following these conversations, Holmwood and Middendorf drove to the roll-off. They confirmed again that it contained copper and removed some additional pieces. Pet. App. 7; Gov't C.A. Br. 6, 8.

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also be moved as a unit within a scrap yard by crane. Pet. App. 5 n.1.

Once Middendorf returned to the police station, he contacted David Seyboldt, a GE employee. Seyboldt came to the station, examined a piece of copper that Middendorf had removed from the roll-off, and stated that it was similar to the scrap that GE produced. The next morning, Seyboldt went to the roll-off himself, determined that it contained a great deal of copper of the sort GE produced, and then informed the police. Pet. App. 7-8; Gov't C.A. Br. 8.

Middendorf swore out an affidavit and applied to a state judge for a warrant to seize the roll-off and its contents. In the affidavit, Middendorf relied on Fuchs's initial search of the roll-off to show that it contained copper, and on information from Seyboldt to show that the copper was GE's. The affidavit also relied on information from Fuchs and Seyboldt about GE and Lincoln Metal practices in handling copper scrap to show that the copper in the roll-off had been taken from GE unlawfully. Pet. App. 8-9; Gov't C.A. Br. 8.

After a state magistrate issued the warrant, the roll-off was seized, the top layer of steel was removed, and the copper was weighed. The roll-off was found to contain approximately 26,000 pounds of copper. Pet. App. 11-12; Gov't C.A. Br. 8.

2. Petitioners were convicted of conspiring to transport stolen property, but they were acquitted of the substantive counts charging them with transporting stolen property. Their presentence reports (PSRs) recommended an eight-level increase in their offense levels pursuant to Sentencing Guidelines § 2B1.2(b)(1) (Nov. 1, 1988)[3] because "the value of the stolen property was more

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[3] After most of the acts charged as part of petitioners' conspiracy had been committed, the Sentencing Guidelines applicable to petitioners' offense were amended, United States Sentencing Comm'n, *Guidelines Manual* App. C, at 39-40 (1992) (amend. 99; effective Nov. 1, 1989), but the amendment is not

than $100,001 but less than $200,000." Pet. App. 26-27. The probation office based that recommendation on its finding that petitioners had caused five loads of stolen copper worth approximately $21,600 each to be shipped across state lines. Gov't C.A. Br. 36. The recommended enhancements raised petitioners' offense levels from 6 to 14 and elevated their indicated Sentencing Guidelines ranges from 0-6 months' imprisonment to 15-21 months' imprisonment. Pet. App. 26 n.4.

Petitioners objected that their offense levels should not be increased for the conduct charged in the substantive counts, on the ground that the Constitution prohibits punishing someone for conduct of which he has been acquitted. The district court, however, rejected their claim and adopted the recommendations of the PSRs, explaining that the standard of proof at sentencing is lower than at trial. Pet. App. 27-28; Tr. 1419, 1424-1425, 1430-1431, 1447-1448, 1449, 1462.

3. The court of appeals affirmed the upward adjustments. Pet. App. 26-33. The court of appeals agreed with the district court's general analysis, explaining that because sentencing facts need be proved only by a preponderance of the evidence, use of acquitted conduct to adjust a sentence is not inconsistent with a jury's conclusion that the elements of an offense have not been proved beyond a reasonable doubt. *Id.* at 28-29.

Petitioners had argued, see Pet. App. 30, that considering acquitted conduct at sentencing violated their double jeopardy, due process, and Sixth Amendment rights. The court of appeals also rejected those arguments. *Id.* at 31-33. The court reasoned that "because [petitioners'] sentences were imposed as punishment for the offense for which they were convicted, not for the offenses for which

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material to the question presented in the petition. See Pet. App. 27 n.5.

they were acquitted," their double jeopardy rights were not violated. *Id.* at 31-32. The court also concluded that since the right to a jury trial does not apply at sentencing, petitioners' Sixth Amendment rights were not violated. *Id.* at 32. Finally, the court ruled that because facts used at sentencing need not be proved beyond a reasonable doubt, petitioners' due process rights also were not violated. *Id.* at 32-33.[4]

ARGUMENT

Petitioners claim that a district court determining the sentence for a convicted defendant cannot consider conduct charged in counts on which the defendant has been acquitted. Pet. 7-23. They argue more specifically that such consideration of acquitted conduct violates their right to be free from double jeopardy. Pet. 7-19. Petitioners' claim does not warrant review by this Court.

1. This Court has recognized for many years that "[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." *Williams* v. *New York*, 337 U.S. 241, 247 (1949). For that reason, "both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the

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[4] The court of appeals rejected petitioners' claims that their conduct did not violate 18 U.S.C. 371, Pet. App. 23-25, and that the district court had erred in denying them a reduction to their base offense level for acceptance of responsibility, *id.* at 33-41. Since the district court had not made findings of fact in support of its denial of petitioners' motions to suppress the fruits of the search and seizure of the roll-off, the court of appeals remanded the case so that the district court could make the factual findings necessary to resolve the parties' claims. *Id.* at 42. Petitioners indicate that the district court has denied their suppression motion on remand. Pet. 2 n.1.

sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Id.* at 246. Historically, therefore, a district judge at sentencing could "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come," and a sentence imposed within statutory limits would not be disturbed unless it was "founded at least in part upon misinformation of constitutional magnitude." *United States* v. *Tucker*, 404 U.S. 443, 446-447 (1972).

Before the Sentencing Guidelines came into effect, this Court repeatedly stated that a trial court could consider at sentencing evidence concerning a crime for which the defendant was never charged, tried, or convicted. *E.g.*, *United States* v. *Grayson*, 438 U.S. 41, 45-52 (1978) (trial court may consider defendant's perjury committed during trial testimony); *Williams* v. *New York*, 337 U.S. at 244 (trial court may consider other crimes committed by the defendant). Similarly, the lower courts consistently had concluded that a sentencing court could consider evidence regarding a crime for which the charges had been dismissed,[5] for which the defendant's conviction had been reversed on appeal,[6] or for which—as in this case—the defendant had been acquitted at trial.[7]

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[5] *E.g.*, *United States* v. *Ortiz*, 742 F.2d 712, 714 n.3 (2d Cir.), cert. denied, 469 U.S. 1075 (1984); *United States* v. *Hansen*, 701 F.2d 1078, 1081 (2d Cir. 1983); *United States* v. *Needles*, 472 F.2d 652, 654-656 (2d Cir. 1973); *United States* v. *Doyle*, 348 F.2d 715, 721 (2d Cir.), cert. denied, 382 U.S. 843 (1965).

[6] *E.g.*, *United States* v. *Atkins*, 480 F.2d 1223, 1224 (9th Cir. 1973).

[7] *E.g.*, *United States* v. *Donelson*, 695 F.2d 583, 590 (D.C. Cir. 1982) (Scalia, J.) (dictum) ("It is well established that a sentencing judge may take into account facts introduced at trial relating to

The Sentencing Guidelines embrace those principles. Section 6A1.3(a) provides that a court "resolving any reasonable dispute concerning a factor important to the sentencing determination * * * may consider relevant information without regard to its admissibility under the rules of evidence at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." If there is a question about the reliability of the information available to the court, the appropriate response is not—as petitioner suggests—to ignore probative information, but instead to conduct an evidentiary hearing to resolve that question. See Sentencing Guidelines § 6A1.3, Commentary.

In arguing that a sentencing court errs when it considers facts underlying charges on which a defendant has been acquitted, petitioners overlook the fact that different standards of proof apply at the guilt and sentencing stages. Although the beyond-a-reasonable-doubt standard applies to the resolution of the question of the defendant's factual guilt at the guilt stage of a criminal case, *In re Winship*, 397 U.S. 358 (1970), the Constitution does not require that the government prove facts relevant to sentencing to that degree of certainty; rather, the preponderance-of-the-evidence standard provides all the process due under the Fifth Amendment. *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986). An acquittal does not prove that the defendant did not commit the charged acts; it establishes only that the government

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other charges, even ones of which the defendant has been acquitted."); *United States* v. *Funt*, 896 F.2d 1288, 1300 (11th Cir. 1990) ("an acquittal does not bar a sentencing court from considering the acquitted conduct in imposing sentence"); *United States* v. *Bernard*, 757 F.2d 1439, 1444 (4th Cir. 1985); *United States* v. *Morgan*, 595 F.2d 1134, 1136-1137 (9th Cir. 1979); *United States* v. *Cardi*, 519 F.2d 309, 314 n.3 (7th Cir. 1975); *United States* v. *Sweig*, 454 F.2d 181, 183-184 (2d Cir. 1972).

failed to demonstrate the defendant's guilt beyond a reasonable doubt. Accordingly, a finding that the government did not prove the existence of a fact beyond a reasonable doubt in the guilt stage of a criminal trial does not bar the government from attempting to prove the existence of that fact in other circumstances where the lower, preponderance standard of proof is applicable. See *Dowling* v. *United States*, 493 U.S. 342, 348-350 (1990); *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 361-362 (1984); *One Lot Emerald Cut Stones & One Ring* v. *United States*, 409 U.S. 232, 235 (1972); *Helvering* v. *Mitchell*, 303 U.S. 391, 397 (1938). Given the different standards of proof that apply at the two different stages of a criminal case, the Constitution does not bar a sentencing court from finding facts that a jury has rejected in the course of returning a not-guilty verdict.

Petitioners nevertheless contend that the Double Jeopardy Clause bars consideration of acquitted conduct at sentencing. As the court of appeals correctly ruled, Pet. App. 31-32, however, consideration of conduct for which a defendant has been acquitted does not violate the Double Jeopardy Clause because that conduct is considered, not to punish the defendant for a crime of which he has not been convicted, but to increase his sentence for a crime of which he has been convicted. See *United States* v. *Rodriguez-Gonzalez*, 899 F.2d 177, 181 (2d Cir.), cert. denied, 498 U.S. 844 (1990); *United States* v. *Mocciola*, 891 F.2d 13, 17 (1st Cir. 1989); *United States* v. *Juarez-Ortega*, 866 F.2d 747, 749 (5th Cir. 1989).[8]

2. Since the Sentencing Guidelines went into effect on November 1, 1987, 11 of the regional courts of appeals

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[8] Petitioners' reliance on *Coffey* v. *United States*, 116 U.S. 436, 443 (1886), is misplaced. This Court has repudiated the rationale of *Coffey*. See *United States* v. *One Assortment of 89 Firearms*, 465 U.S. at 361, 366.

have agreed that a sentencing court may rely on evidence of a defendant's conduct relating to charges on which the defendant was acquitted at trial. See *United States* v. *Boney*, 977 F.2d 624, 635-636 (D.C. Cir. 1992); *United States* v. *Mocciola*, 891 F.2d at 16-17; *United States* v. *Rodriguez-Gonzalez*, 899 F.2d at 180-181; *United States* v. *Ryan*, 866 F.2d 604, 608-609 (3d Cir. 1989); *United States* v. *Isom*, 886 F.2d 736, 738-739 (4th Cir. 1989); *United States* v. *Juarez-Ortega*, 866 F.2d at 749; *United States* v. *Duncan*, 918 F.2d 647, 652 (6th Cir. 1990), cert. denied, 111 S. Ct. 2055 (1991); *United States* v. *Fonner*, 920 F.2d 1330, 1332-1333 (7th Cir. 1990); *United States* v. *Dawn*, 897 F.2d 1444, 1449-1450 (8th Cir.), cert. denied, 498 U.S. 960 (1990); *United States* v. *Coleman*, 947 F.2d 1424, 1428-1429 (10th Cir. 1991), cert. denied, 112 S. Ct. 1590 (1992); *United States* v. *Averi*, 922 F.2d 765, 765-766 (11th Cir. 1991). The sole exception is the decision of a divided panel of the Ninth Circuit in *United States* v. *Brady*, 928 F.2d 844, 851-852 (1991).

The conflict between *Brady* and the settled weight of authority in the other circuits does not warrant review. That conflict involves the construction of the Sentencing Guidelines and therefore is a matter that the Sentencing Commission is entirely capable of resolving. See *Stinson* v. *United States*, 113 S. Ct. 1913 (1993); *Braxton* v. *United States*, 111 S. Ct. 1854, 1857-1858 (1991). In the wake of the *Brady* decision, the Sentencing Commission sought comment "on whether it should provide expressly that conduct of which a defendant is acquitted, but which the court at sentencing nevertheless determines to have been established by a preponderance of the evidence, may be used [to determine the defendant's sentence under the Sentencing Guidelines]." 57 Fed. Reg. 113 (1992) (Proposal 35(C)). Although the Sentencing Commission neither accepted nor rejected such a provision in its 1993 series of amendments to the Sentencing Guidelines, the

Commission could resolve the issue by a change in the Guidelines in the future. Review by this Court is therefore unnecessary at this time. This Court has repeatedly denied review in cases presenting this issue during the two years since *Brady* was decided.[9] There is no need to treat this petition differently.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

THOMAS M. GANNON
Attorney

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[9] See, *e.g.*, *Rodriguez* v. *United States*, 113 S. Ct. 3019 (1993); *Langh* v. *United States*, 113 S. Ct. 2366 (1993); *Martin* v. *United States*, 113 S. Ct. 1058 (1993); *Banks* v. *United States*, 113 S. Ct. 470 (1992); *Olderbak* v. *United States*, 113 S. Ct. 422 (1992); *Allison* v. *United States*, 113 S. Ct. 420 (1992); *Coleman* v. *United States*, 112 S. Ct. 1590 (1992); *Van Tassel* v. *United States*, 112 S. Ct. 662 (1991); *Lawrence* v. *United States*, 112 S. Ct. 372 (1991); *Duncan* v. *United States*, 111 S. Ct. 2055 (1991). The issue is also pending before the Court in *Hill* v. *United States*, No. 92-8874, and *Frias* v. *United States*, No. 92-9190.